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NO. 89-1710

In the Supreme Court of the United States

OCTOBER TERM, 1989

IRON WORKERS MID-SOUTH PENSION FUND, LOUISIANA LABORERS HEALTH & WELFARE FUND AND LABORERS NATIONAL PENSION FUND,

Petitioners,

vs.

BORDEN CHEMICAL, A DIVISION OF BORDEN, INC.,

Respondent.

Sub-nom: Iron Workers Mid-South Pension Fund, et al v. Terotechnology Corporation, et al

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. *The Fifth Circuit Court's decision is contrary to the Court's decision in Mackey v. Lanier.*

Respondent first argues that the Court's decision in *Mackey v. Lanier,* 486 U.S. 825, 108 S.Ct. 2182 (1987), is entirely consistent with the decision below of the Court of Appeals for the Fifth Circuit. Respondent reasons that the Georgia statute saved from preemption in *Mackey* is distinguishable from La.R.S. 9:4803(A). Petitioners urgently disagree.

The Georgia statute at issue in *Mackey* was a traditional state garnishment mechanism of general application similar, but not identical, to the garnishment statutes of any other state. What set it apart, however, was an express exception for ERISA plans, Georgia Code Ann. §18-4-22.1 (1982), providing, in pertinent part:

> Funds or benefits of a pension, retirement or employee benefit plan or program *subject to the provisions of the federal Employee Retirement Income Security Act of 1974, as amended,* shall not be subject to the process of garnishment . . . . [Emphasis added.]

Mackey, supra, 108 S.Ct. at 2184, n.2. The Court correctly found this exception—despite its possible intent to help effectuate ERISA's underlying purposes—to be preempted:

> [W]e hold that Georgia Code Ann. §18-4-22.1, *which singles out ERISA employee benefit plans for different treatment* under state garnishment procedures, is pre-empted under §514(a). The statute's express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach. [Emphasis added.]
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> * * * * *
>
> This "different treatment" is illustrated, not only by the express reference to ERISA plans in the language of §18-4-22.1, but also in the disparate treatment accorded to non-ERISA benefit plans

> under Georgia law. Under the State's garnishment statutes, non-ERISA pension and retirement plans are exempted from garnishment, but no exemption is provided for non-ERISA employee welfare benefit plans. Compare Ga.Code Ann. § 18-4-22 (Supp.1987) with Ga.Code Ann. § 18.4.22.1 (1982) *Consequently, ERISA welfare benefit plans are protected from garnishment under Georgia law,* but *non-ERISA* plans are not so protected. [Emphasis added.]

Mackey, 108 S.Ct. at 2185.

However, no such conclusion may be reached by reference to the Louisiana Private Works Act. First, contrary to Respondent's claim, La.R.S. 9:4803(A) makes no express reference to "ERISA plans, as did Georgia Code Ann. § 18-4-22.1; rather, it refers to "*Trustees, trust funds, or other persons* to whom the employer is to make such payments, (emphasis added)" *under a collective bargaining agreement,* for

> vacation, health and welfare, pension, apprenticeship and training, supplemental unemployment benefits, and other fringe benefits considered as wages by the Secretary of Labor of the United States in determining prevailing wage rates, ...

La. R.S. 9:4803(A). Thus, some ERISA plans are included in the §4803(A) definition of "trust funds", while others are not.[1] Conversely, some non-ERISA plans are also included, while others are not.[2] Additionally, §4803(A) gives stand-

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1. For example, jointly administered plans such as Petitioners, which are established on the basis of and administered under §302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186(c)(5), are also administered under ERISA. §2(1)(B) of ERISA, 29 U.S.C. §1001(1)(B). However, a plan which is not collectively-bargained and whose contribution obligation is not defined by a labor agreement is not included in the "trust fund" definition even though administered under ERISA.

2. A collectively-bargained *disability* benefits plan, e.g., may

ing to "other persons" than "trustees" and "trust funds", providing only that the contract defines that "other person" as the recipient of the benefit in question. Thus, unlike the Georgia statute in *Mackey*, §4803(A) contains no express reference to ERISA plans.

Moreover, while Petitioners agree that Georgia Code Ann. §18-4-22.1 sought to exempt ERISA plans from state garnishment process, no similar exemption is found in the Louisiana statute at issue, for La.R.S. 9:4803(A) does not treat ERISA plans differently nor accord them any more favorable treatment under the law than non-ERISA plans or "other persons" having rights under the agreement. The different treatment, rather, is based on whether or not the trust in question is collectively-bargained. And since *all* collectively bargained plans are by very definition both established and administered under §302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186(c)(5),[3] as well as under ERISA,[4] the disparate focus of §4803(A) is rather upon whether or not the plan in question is administered under §302(c)(5) of the Labor Management Relations Act. Thus, §9:4803(A) treats all plans and all persons whose standing springs from a collective bargaining agreement, whether ERISA regulated or not, in exactly the same manner. Therefore, the two statutes are by no means

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Footnote 2 continued.
nevertheless not be regulated by ERISA because exempted from ERISA coverage, §4(b)(3), 29 U.S.C. §1003(b)(3); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 106-7, 103 S.Ct. 2890, 2905 (1983); while a legal services fund tax qualified under §501(c)(5) of the Internal Revenue Code, 26 U.S.C. §501(c)(5) and sponsored only by a Union, *would* be governed by §2(1), ERISA, 29 U.S.C. §1001(1). The first would be excluded from the §4803(A) "trust fund" class, while the second would be included.

3. §302(c)(5) of the Labor Management Relations Act provides, in pertinent part, that collectively bargained payments by employers must be made to a separate trust fund established to provide benefits, which trust must be jointly administered by labor and management.

4. The ERISA definition of "employee benefit welfare plan", includes at §3(1)(B) any plan providing "any benefit described in 186(c) of this title . . . ."

analogous, as Respondent argues.

Petitioners also take issue with Respondent's further argument, that §9:4803,unlike Georgia's general garnishment law, provides an independent cause of action "for the collection of unpaid contributions." This argument was endorsed by the Fifth Circuit Court, which noted that:

> Louisiana's Private Works Act cannot be brought under the authority of *Mackey*, because without it Borden, who is not an employer, would not be liable to the Funds. The Private Works Act creates a substantive right against the property owner that is not created by ERISA, and goes beyond merely a means of enforcing a judgment.

Iron Workers Mid-South Pension Fund, et als v. Terotechnology, et als., 891 F.2d 548, 556 (5th Cir. 1990).

Petitioners point out to the Court that the substantive obligation created by the Louisiana Private Works Act, whereby the owner of a project is rendered liable as a guarantor of a contractor performing work at a jobsite, by no means intrudes upon ERISA; neither an owner nor a contractor are, without more, ERISA parties, ERISA does not regulate this relationship, and no "plan" is involved. Moreover, the substantive right created by the Louisiana law enabling the contractor's employee to enforce his rights to wages, including fringe benefits, against the owner as his employer's guarantor, does not intrude upon ERISA either; again, ERISA does not regulate this relationship or this cause of action, and no plan is involved. Were these the only provisions of the Louisiana Private Works Act at issue, then, their preemption under ERISA would be entirely improper.

Rather, it is the fact that the state statute validates the standing of others, including ERISA plans, to pursue the employee's rights against the owner, that leads §4803(A) into the preemption quagmire. But it is *not* §4803(A), or any other provision in the Private Works Act,

that creates this cause of action in favor of an employee benefit plan—it is *the collective bargaining agreement itself* that creates the cause of action in the plan, by requiring that contributions to be paid by the employer for work performed by its covered employees be paid not to the employee but directly to a third party beneficiary employee benefit plan. In effect, the labor agreement thus *diverts* the cause of action from the employee to the plan. And this contractual action of the Plan would exist whether or not it were recognized by the Private Works Act.

In short, while a lien enforcement action by an employee against the owner of a project is indeed a substantive right that would not exist absent the Louisiana law, the Fund's right to step in the employee's shoes and to pursue that action on the Fund's behalf is not. It arises from the collective bargaining agreement, not from the state law. Viewed in this light, the lien action so pursued against the owner is no longer a debt for contributions owed by the employer, as it would be against the contractor, but is rather an action for damages owed under a statutory guarantee, the dimensions of which are measured by the employer's contractual contribution rate. Like the *Mackey* general garnishment statute, the Louisiana Private Works Act "creates no substantive causes of action, nor new bases for relief, or any new grounds for recovery; [it] does not create the rule of decision in any case affecting liability." *Id.*, 108 S.Ct. at 2188, n.10.

Thus, the Funds' lien enforcement action against Borden under the Louisiana Private Works Act is nothing more than a run-of-the-mill contract suit against an employer's guarantor. It is no different than a state action by the Fund to collect from a private contractual surety a rental debt owed by a minor whose parents have guaranteed the rent on rental property owned by the Fund. In the first case, the damages are measured by the applicable collective bargaining agreement; in the second, they are measured by the lease. In neither case is preemption appropriate, for the obligations at stake and the par-

ties pursued are not of concern to ERISA or ERISA plans, and the state actions afforded to collect the debts in no manner either relate to ERISA plans or seek to regulate their terms.

Alternatively, even if ERISA preemption were mandated, a fund's action against a statutory surety, like an action against any other party who by contract or otherwise agrees to guarantee or to pay the debt of a contributing employer, may properly be regarded as an action under §502(a)(3)(ii) to enforce the terms of the plan rather than a §515 action to collect delinquent contributions, if like the Plans of Petitioners, the collective bargaining agreement defines the contribution rate incorporated into the Plan. Such an action against a surety is appropriately incorporated into ERISA as part of its federal common law.[5]

Accordingly, Petitioners suggest that review of the decision below is entirely appropriate, as contrary to this Court's opinion in *Mackey v. Lanier, supra.*

II. *Recently reported state court decisions further evidence their confusion in addressing state lien rights and ERISA preemption.*

Petitioners direct the Court's attention to two newly issued opinions of direct interest to the matter at hand.

In yet another preemption claim based on California's lien provisions found at Civil Code Section 3111,[6] *Sheet Metal Workers Pension Plan of So. California,*

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5. *See* Petitioners' argument in this respect in their Original Brief, at pp. 19-20.

6. *See also, Carpenters Health & Welfare Trust Fund v. Parnas Corp.*, 176 Cal.App. 1196, 222 Cal.Rpt. 668, 7 EBC 1031 (1986) (employee benefit fund's actions to enforce state lien rights is not preempted by ERISA); *Carpenters Southern California Administrative Development Corp. v. El Capitan Development Co.*, 243 Cal.Rpt. 132 (Cal.Ct.App. 1988), *cert.granted*, 246 Cal.Rpt. 209, 753 P.2d 1 (Cal.1988) (similar action is preempted by ERISA).

Arizona and Nevada, et al v. Columbia Savings & Loan Association, et al, 12 EBC 1494 (Superior Court, Appellate Department, County of Los Angeles), the Court found the state statute not to be preempted by ERISA, rejecting respondents' arguments that the Court's decisions in *Pilot Life Ins. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549 (1987) and *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 107 S.Ct. 2211 (1987) should dictate preemption. The court held:

> We have reviewed [Pilot Life and Coyne], relied upon by respondents, but do not find them to be persuasive or controlling in the relatively simple posture of this case.

Sheet Metal Workers, supra, 12 EBC at 1495-6. The Court dismissed respondents' argument that when a pension plan is attempting to collect monies "due and payable" *Id.* at 1496, ERISA controls. When examined against the purposes of ERISA, the court held, such an argument proves to be "an expression of 'black literalism' rather than a careful analysis of the law. The court viewed the lien action, rather, as:

> . . .an ordinary debt owed under collective bargaining agreements sought to be collected pursuant to a local statute designed to provide a remedy when payment is not forthcoming.
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> * * *
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> In the case at bar, the controversy is completely external to the pension plan entities and to the plans themselves. The entities are merely trying to collect an allegedly honest obligation on behalf of the members of the plan, with contractual standing to be the collecting entities.

Id.

The court's clear focus in *Sheet Metal Workers, supra,* upon the extraneousness of a fund's action to collect a contractually owed debt to the purposes of ERISA and ERISA plans, echoes the equally clear pronouncements

issued by this Honorable Court in *Mackey v. Lanier,* 483 U.S. 1004, 108 S.Ct. 2182 (1988) wherein the Court recognized that ERISA plans may sue and be sued in multiple run of the mill claims for unpaid rent or failure to pay creditors.

In a second recent case, *Boise Cascade Corp. v. Peterson,* ____ F.Supp. ____, 12 EBC 1384 (1990), the United States District Court for the District of Minnesota considered an ERISA preemption claim in context of a state administrative law mandating a three-to-one ratio of journeymen to apprentices in the high pressure pipefitting industry. The plaintiffs, all construction industry employers, attempted to convince the court that the state law must fall due to its intrusion into the administration of the ERISA multiemployer apprenticeship training plan jointly sponsored by the plaintiffs. After careful consideration of the purpose of the ERISA preemption clause and the underlying regulatory concerns of ERISA, the court held:

> The 3-to-1 rule is not preempted because *it is a rule of general application concerning a subject traditionally reserved to the states which has no implications for ERISA's regulatory concerns and only an incidental effect on the administration of training programs.* It in no way threatens the administrative integrity of employee benefit plans. The rule does not in any way conflict with Congress' purpose in enacting ERISA 'to provide for a uniform source of law in the areas of vesting, funding, insurance and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports,' [Citations omitted.] The rule is an occupational training requirement enacted to protect public safety. Even with ERISA's broad preemption provision, we 'must presume that Congress did not intend to pre-empt areas of traditional state regulation". *Metro-*

politan Life Insurance Co. v. Massachusetts, 105 S.Ct. 2380, 2389 [6 EBC 1545] (1985). . . . .

Boise Cascade Corp. v. Peterson, supra, 12 EBC at 1390-91. This analysis applies equally well to Louisiana's Private Works Act, as Petitioners have already argued to this Court. *See,* Petitioners' Original Brief herein at pp.18-19.

The foregoing two cases illustrate further the mounting judicial confusion and bewilderment evident in regard to an ERISA Fund's rights to pursue non-ERISA actions against non-ERISA parties who, like Borden, have no standing to seek ERISA's protection and, in fact, seek to utilize it to escape from state-imposed obligations traditionally outside of federal concern—all at the expense of the very parties—the Plans' participants—that ERISA purports to protect.[7]

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully urge this Honorable Court to review the erroneous decision herein of the Fifth Circuit Court of Appeals, which conflicts directly with prior Court decisions. In the event such "black literalism" survives, it will inevitably affect the increasingly fragile financial viability of multiemployer and other jointly-administered plans, including Petitioners', while permitting ERISA and non-ERISA plans whose contribution base in not collectively bargained to continue utilizing the Private Works Act

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7. Petitioners suggest to the Court that were the Petitioners the hypothetical owners of Louisiana property upon which laborers perfected wage liens under the Private Works Act, the ERISA preemption clause would not operate to protect the Plans from subsequent state lien enforcement actions, despite their intrusion into the Funds' administration or funding, since under this Court's reasoning in *Mackey, supra,* an ERISA plan must be prepared to respond to such ordinary claims. Petitioners cannot conceive any basis for treating them differently merely because they themselves assume a plaintiff position.

as a protective device against employer defaults. It is inconceivable such different treatment is either condoned by ERISA or within the contemplation of its legislative drafters.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Reply Brief in Support of Petition for Writ of Certiorari has been served upon the following by depositing copies of same in the U.S. Mail, first-class postage prepaid, this 19th day of June, 1990.

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